

applications so controlled minorities received licenses at rates higher than their participation in all licenses and in radio licenses, but at lower rates for television licenses. When compared to all license applicants (without regard to control), minority-controlled applicants received licenses at statistically significant lower rates and non-minority-controlled applicants received licenses at statistically significant higher rates. *Id.*, at 31-34.

5. Measuring the number of parties in applications and the number of applications in hearings, there were more parties in applications with minority representation (5.9) than applications with only whites (4.3), and an even greater difference among winning applications, 8.3 for winning applications with minority representation and 5 for winning white applications. There are also higher numbers of applications in hearings in which there is an application with minority representation (3.7) than in hearing where there is no minority representation (3.2), and an even greater difference where there is at least one minority-controlled application (4.0) compared to at least one white-controlled application (3.3). *Id.*, at 36-37.

Thus, the Study suggests that: minority participation in licensing hearings was low, that minority utilization, or ownership, is low, due to low levels of participation; and, that minorities received licenses at statistically significant rates above or below their level of participation, except when defined by control of equity and compared to all applications, where there was statistically significant underutilization of minorities and overutilization of non-minorities in licensing. Thus, the Study reveals that minorities were less able to qualify to participate in hearings, and when they did qualify, their minority status did not result in any disproportionate award of licenses, that is, their minority status did not improve their chances of winning a license in the FCC's comparative hearing process. In fact, applications that included minorities faced greater competition in hearings, particularly when they were included in the winning application and when minorities controlled equity in one of the applications.

*c. Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC.*

This Study also examined the licensing process during the same period as the Study of Utilization Rates when licenses were awarded based on an uncontested application (referred to as a "singleton") or, if contested, through the comparative hearing process. This Study developed, through logistic regression analyses, "a model of the comparative hearing award process for radio and television licenses and a model that examines factors that are deterministic of whether a license was awarded through a comparative hearing or directly to a singleton applicant...[and] results for a model of the award process for all licenses regardless of whether they were awarded through comparative hearings or to singleton applicants." See *Logistic Regression Models of the Broadcast License Award Process for Licenses Awarded by the FCC*, at p. 3, 17-18. The Study used a subset of the hearings analyzed in the Study of Utilization Rates, but with additional and more specific data in order to model the process of awarding licenses according to variables the FCC

claimed influenced decisions, as well as variables reflecting competition and station value. *Id.*, at p. 7-9, 16-17.<sup>6</sup>

As with the Study of Utilization Rates, the Regression Models Study has limitations in its ability to analyze whether discrimination adversely affected minorities in the FCC licensing process.

First, this Study also does not analyze licensing for the extensive period before the advent of minority ownership policies, as data was unavailable, or since, and therefore does not analyze whether there was discrimination in licensing or in the broadcast industry over most of its life and as it operated without a regime of credit for potential minority ownership. Again, this Study only measures the effect of minority ownership policies. *Id.*, at p. 5-6 & n. 5.

Second, this Study also does not analyze license transactions in the secondary market, again because data was unavailable, and therefore does not analyze whether there was discrimination in the private market for broadcast licenses. *Id.*, at p. 3 n. 1.

Third, as with the Study of Utilization Rates, this Study does not use the traditional measure of disparities between those who obtained licenses and those "ready, willing and able" to participate in the broadcast industry. Instead, it analyzes only those who obtained licenses on the basis of those who actually applied. As stated in the Study:

Our analysis starts at the point where an application has been made. We do not model the decision process by which some people decide to submit applications and some do not. It is possible that the number of female or minority applicants is not optimal because minorities and females may have had lesser chance to submit an application due to impediments such as inability to secure financing. That issue is beyond the scope of this analysis which only considers the license award decision after an application has been made. We do note, as the following data will suggest, that minority participation in broadcasting is very low relative to minority representation in the general population.

*Id.*, at p. 10 (footnote omitted).

Subject to these limitations, the Study presents a number of conclusions regarding FCC licensing.

1. The Study, although not developing a statistical analysis of the question of those "ready, willing and able" to participate in licensing, concluded that "[m]inority participation in comparative hearings was very low relative to minority representation in the U.S. population." *Id.*, at p. 32.

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<sup>6</sup> This included data from "the following categories: general, legal, financial, attorney and trial, settlement, technical, ownership and integration, race, and gender." *Id.*, at p. 7.

2. The Study concluded that, under the regime of minority ownership policies, although the licensing process gave credit for potential minority ownership interests, the FCC gave such credit largely in applications controlled by non-minorities in which minorities participated, but with negligible ownership or equity shares. Moreover, the FCC failed to afford minority ownership, measured as a percentage of ownership or as more than a 50% share of ownership, a statistically significant influence in the probability of obtaining a license. Stated simply, the FCC failed to credit minority ownership in license applications, but credited nominal minority participation in non-minority-controlled applications. Specifically, the Study found:

- a. When considering both singleton applications and those subject to the comparative hearing process, the Study concluded that minority ownership policies did not enhance the utilization of minorities in broadcasting relative to their participation in the process:

Based on the models that we estimated, we can conclude that there was a lower overall probability for an application with minority ownership winning a license than a non-minority application after controlling for a variety of important variables. This is because there was a lower probability of winning a license as a singleton and no greater chance for an application with minority ownership to win a license in a comparative hearing.

*Id.*, at p. 32.

- b. In analyzing the comparative hearing process, the Study concluded that the benefit of credit for minority participation did not extend to minority ownership or control, only to participation of minorities in winning applications:

The process for awarding licenses through the comparative hearing process provided credit to applications that contained minorities and females, as was the stated policy of the FCC.... However, while minority participation -- as defined by minority percentage of body counts -- appears to have positively influenced the win rates in comparative hearings, minority participation when defined by percentage ownership or majority percentage ownership, does not significantly influence the probability of acquiring a license." *Id.*, at p. 32.

- c. With regard to singleton applications, the Study concluded that minority applicants were less likely to obtain licenses through these unopposed applications than non-minorities. Where minority applications were first filed, rather than deterring others from filing competing applications, as would be expected, the FCC's policies served to increase challenges, with the result that minorities were less likely to obtain singleton licenses than non-minorities:

The probability of winning a license is lower for a minority (where minority is defined either by ownership or percentage body count) who files as a singleton than for a non-minority who files as a singleton because minority singleton applications are challenged more often than non-minority singleton applicants.

In addition, the Study found that minority participation in singleton applications was lower than in applications subject to comparative hearings:

The minority participation rate for singleton licenses, which appear to be less valuable than those allocated through comparative hearings, was even lower than the low rate of minority participation in comparative hearings. A reason for this may be due to the fact that minority and female preferences encouraged applicants to recruit minorities and females in order to compete more effectively in comparative hearings.

*Id.*, at pp. 32-33.

- d. The results of a number of analyses led the Study to conclude that FCC credits for minority participation in ownership resulted in the recruitment of minorities to participate in, or supplement, ownership in applications controlled by non-minorities in comparative hearings for more valuable licenses in order to enhance the prospects of non-minority firms to obtain licenses, rather than enhancing the prospects of minority-owned licenses, measured by the percentage of participants in a license application or the percentage of minority equity. This conclusion and some of the evidence supporting the hypothesis, is described in the Study as follows:

The comparative hearing process during the period of minority preferences that we examined seems to have awarded credit for minority participation that was the stated objective of the FCC. However, the process seems to have encouraged figurative minority participation that supplemented rather than substituted for non-minority participation.

This conclusion is supported by the fact that there is no statistically significant influence of minority ownership on the probability of winning a license in a comparative hearing after controlling for the factors that the FCC announced were used to award licenses in comparative hearings. This is true whether minority ownership is defined as a continuous variable (i.e. on a zero to 100 percent interval) or when ownership is defined as minority only if minorities own more than 50% of the application.

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This finding [that minority participation defined by percentage ownership or majority percentage ownership do not significantly influence the probability of obtaining a license] is consistent with another finding that minority participation is greatest when there is little minority equity ownership – a finding suggestive of the existence of non meaningful (sham) participation.

We found a statistically significant relationship between win rates and minority body count but not between win rates and minority equity ownership. This finding supports a hypothesis of sham participation.

*Id.*, at p. 32.

These data generally support the theory that minority and female participation occurs most when the stations are most valuable and where the presence of minorities and females can bolster the probability of winning a license. Height of the station antennas, population, and household income are higher when minorities and females participate in applications. These are all indicators of the value of the station.

Payments and receipts are higher when there is nominal minority and female participation in applications; this is another indication that nominal minority and female participation occurs most in competitive situations.

The number of parties in applications is substantially higher when minorities participate; however this phenomenon is much less obvious when minorities control equity.

Because minorities tend to participate when valuable licenses are at stake, and because the number of participants in these applications is greater by far, it is possible that minorities were added to these applications in order to improve the likelihood of winning, but may not add much in the way of meaningful minority ownership to these applications.

*Id.*, at pp. 33-34; see also *id.*, at p. 32.

- e. The Study concluded that the FCC ownership policies had little, if any, effect on the rate at which minorities received licenses. Referring to the above-quoted findings, the Study concluded that, “[t]hese are all important conclusions because we examined the differences in minority and nonminority license award[s][sic] during a period when minority preferences were in place. These results suggest that the impact of minority preferences on license award rates was minimal at best.” *Id.*, at p. 34.

In conclusion, the Study found that: minority participation in FCC licensing hearings was “very low” compared to the general population; when controlling for a number of

important variables, in licensing under the FCC's minority ownership policies overall, qualified minorities had a lower probability of obtaining a license; minority applicants had a lower chance of winning a license as a "singleton" and no greater chance of winning a license in a comparative hearing; when controlling for a number of important variables; the FCC gave credit for minority ownership where there was nominal minority participation in majority-controlled applications but not for minority ownership or minority-control; the FCC's minority ownership policies led to recruitment of minorities for participation in majority-controlled applications for more valuable licenses; and, the FCC's minority ownership policies designed to increase minority ownership had little, if any, effect on minority license ownership.

## *2. FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions*

This Study analyzed the results of wireless spectrum auctions, by race and gender, auction type, industry, and size of business, to examine measures of auction outcomes and measures of the financial implications of those outcomes. See FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions, at pp. 2-3, 8. It must be noted minority owned businesses received bidding credits in only three of the nineteen auctions analyzed (thereafter bidding credits were available only to "small businesses"), *id.*, at 8 n. 10, and the Study reports very limited information separately for the three auctions in which minorities received bidding credits<sup>7</sup>. In seven of the nineteen auctions studied, installment plans were also available to small businesses. *Id.*, at p. 8. Thus, unlike the analyses of the broadcast licensing process, discussed above, this Study does not measure the effects of minority ownership policies but, to a degree not reported in the Study, reflects the effects of measures to assist small businesses.

With respect to utilization, this Study also analyzes the rate at which those who qualified to participate in auctions succeeded in obtaining licenses ("success ratios"), but it also measures the rate at which all applicants, qualifying or not, succeeded in obtaining licenses ("general utilization ratios"), and the rate at which applicants succeeded in qualifying to participate in auctions ("qualifying ratios"). *Id.*, at p. 2-3.

With these limitations in mind, the Study provides the following information.

1. Minority applicants were less likely to win at least one license, relative to other applicants, at rates that are statistically significant ("general utilization ratio"). *Id.*, at p. 4.
2. Minorities qualify to participate in auctions at lower rates than other applicants at rates that are statistically significant ("qualifying ratio"). *Id.*

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<sup>7</sup> The Study reports that the economic value shares tended to be generally larger for minority and women applicants in the three auctions in which bidding credits were afforded to minorities and women. *Id.*, at p. 7.

3. On average, qualified minority applicants are more likely to win than qualified non-minority applicants at statistically significant rates ("success ratio"). *Id.*
4. "These findings would suggest that the difference in general utilization ratios may be largely attributable to the differences in qualifying ratios where minority applicants face a lower likelihood of qualifying. However, once qualified, minorities appear to have higher odds of success in auctions." *Id.*
5. Comparing auctions with and without installment plans, minorities obtain licenses ("utilization ratio") and qualify for participation in auctions ("qualification ratio") at statistically significant lower rates than non-minority applicants in both groups of auctions. *Id.*
6. In auctions without installment plans, minorities obtained licenses at statistically significant lower rates than non-minority applicants; however, in auctions with installment plans, minorities obtained licenses at statistically significant higher rates than non-minority applicants ("success ratio"). *Id.*, at pp. 4-5 & Figure 2. The Study observes, but does not analyze or confirm, that the differences in outcomes in auctions with installment plans may be explained by eased constraints on access to capital or inflated price bidding. *Id.*, at p. 5.
7. With respect to the economic consequences of auction outcomes, the Study reports that the value of licenses acquired by minority winners is approximately 12% of the total value of licenses, and increases to approximately 19% of total value in auctions with installment plans, *id.*, at p. 5, but does not discuss or highlight the fact that the minority share of total value essentially disappears, i.e., decreases to only 0.01%, in auctions without installment plans ("economic value shares"). *Id.*, at p. 5, Figure 3, p. 14, p. 28, Table 14.
8. With respect to the economic consequences of auction outcomes, measured on a per winner basis (average economic value per winner), there are no statistically significant differences between minority and non-minority applicants at the aggregate level. When measured in auctions where installment payments were and were not available, there was no significant difference for minorities in auctions with installments, although in auctions without installments, non-minorities received a statistically significant larger value than minorities, although the Study, again, does not discuss or highlight this fact. *Id.*, at p. 6, 15, 31, Table 18.
9. When the economic value of licenses is measured relative to upfront payments (return-on-payment ratio), minority and women applicants tend to obtain a larger share of the economic value of the licenses than their share of upfront payments across all auctions, *id.*, at p. 6. However, interpretation of this measure is unclear, as upfront payments may represent either an indicator of the number or value of licenses minorities are interested in obtaining, or an inability to make payments in amounts necessary to seek the number or value of licenses they would like to have sought. *Id.*, at p. 6. Moreover, when this ratio is analyzed for auctions with and without installments, the Study notes

that minorities generate relatively more revenue than non-minorities in auctions with installments, *id.*, at p. 17, see *id.*, at p. 34, Table 22 (ratio of 0.91 for non-minorities, 1.75 for minorities), but does not discuss or highlight that minorities generate dramatically less revenue (almost none) compared to non-minorities in auctions without installments. *Id.*, at pp. 6, 17, see *id.*, at p. 34, Table 22 (ratio of 1.01 for non-minorities, 0.03 for minorities).

10. When measured by industry group, the general utilization ratio of minorities is significantly lower in advanced paging/data, *id.*, at p. 11, the qualifying ratio of minorities is significantly lower in three of the five industry groups (advanced paging/data, mobile voice and data, and interactive data), *id.*, at p. 12, and the success ratio of minorities is statistically higher in mobile voice and data auctions than non-minority applicants, but lower in other industry groups, except wireless cable, where the number of minority qualified applicants was too low for the use of statistical tests. *Id.*, at p. 13.

11. When measured by size of business, the general utilization ratio of minorities is significantly lower among large companies and not significantly different among small businesses, *id.*, at p. 11, the qualifying ratio of minorities is significantly lower among both small and large businesses, *id.*, at p. 12, and the success ratio of minorities is statistically higher among small businesses and not significantly different among large companies. *Id.*, at p. 13.

In conclusion, this Study found that: minority applicants were less likely to qualify for participation and to win licenses in wireless auctions, including those with and without installment plans; among qualified applicants, minorities received licenses at higher rates overall, but that is attributable entirely to their higher rate of success in auctions with installment plans, as they have a statistically significant lower rate of success in auctions without installment plans (a fact not noted by the Study); there are no differences in economic value per winner; and, although minorities have a higher return on payment ratio, again, that is entirely attributable to auctions with installment plans, as they receive almost no value in non-installment auctions (a fact not noted by the Study), and the significance of this measure is unclear.

Taken together, these Studies demonstrate that the FCC's licensing practices under its minority ownership policies were not only ineffective but, except for auctions with installment plans, actually served to *discriminate against* minority-controlled applications and in favor of majority-controlled licenses with only nominal minority participation. The effects of the FCC's licensing practices revealed in these Studies and the implications of the Studies' results regarding existence of a compelling remedial interest is discussed more fully, and in conjunction with evidence from other Studies and sources, in Section V. C. 1. below.



## **2. Participation in a Discriminatory Marketplace**

As discussed above, for many years FCC policies facilitated and condoned racial discrimination and failed to prohibit discrimination and, later, to enforce its prohibitions against discrimination. These policies reflect the culpability of the FCC with respect to discrimination in the broadcast industry and its continuing effects, and remedying that discrimination provides a compelling interest for the narrowly tailored consideration of race in licensing.

Evidence in the Section 257 Studies, and from other sources, also establishes that even in the absence of its culpability, as the exclusive source of the resources of the broadcast and wireless industries, the sale of licenses and approval of the transfer of licenses in the private market and regulation and control over continued participation in these industries, the FCC is also a passive participant in discrimination by others in these industries. Indeed, as discussed above, where governments act as passive participants by letting contracts in industries that exist apart from the government entity, the passive participation of the FCC in the industries that it has created and controls should be beyond any doubt. These Studies and related sources of information provide a strong basis in evidence of discrimination in these industries, including in areas that affect the ability of would-be participants to: gain exposure and experience to qualify for ownership through employment opportunities; secure financing and capital necessary to gain access to ownership; learn of, and participate in, ownership transactions; and, secure revenue needed for successful ownership in the broadcast industry. Remedying this discrimination in the industries in which the FCC acts as a passive participant is a compelling interest for consideration of race.

### **a. Discrimination by Licensees in Employment and Programming**

As discussed in connection with the history of FCC policies, above, it is clear that broadcasting licensees engaged in discrimination in employment and programming. Although the focus of the preceding discussion was on the FCC's tolerance and insulation of that discrimination, the discrimination practiced by licensees over decades must be recognized as a significant factor adversely affecting the opportunities of minorities to obtain licenses. In 1969, the FCC recognized the pattern of discrimination set by industry, curiously characterized as "indifference." "The direct result of such indifference is that schools, training institutions, recruitment and referral sources follow the pattern set by industry. Employment sources do not normally supply job applicants regardless of race, color, religion or national origin unless asked to do so by employers." *Non-Discrimination in Employment Practices*, 18 FCC 2d at 243 (1969).

The FCC also has recognized the impact of that employment discrimination, on broadcasting, and on a larger scale. "Because of the enormous impact which television and radio have upon American life, the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees.

The provision of equal opportunity in employment in that industry could therefore contribute significantly toward reducing and ending discrimination in other industries." *Id.*, at 240. Indeed, the FCC has recognized the profound effect of employment discrimination on opportunities for license ownership. Race or gender discrimination in employment may impede participation and advancement in the communications industry: "Employment provides business knowledge, judgment, technical expertise, and entrepreneurial acumen, and other experience that is valuable in attaining ownership positions. For example, the Commission has found that employment in the broadcast industry is a valuable stepping stone to broadcast ownership." *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd 6280, 6306 (1996).

Past inquiries by the FCC into employment discrimination as a basis for remedial consideration of race in license ownership, unfortunately reflect a misunderstanding of the showing needed. For example, in calling for "evidence that employment discrimination in the communications industry has been a barrier to entry in the telecommunications market by small businesses owned by minorities or women," the FCC suggested that "[s]ubmissions should be detailed and should explain why the commenter believes the conduct at issue (e.g., failure to hire or promote) was based on race or gender discrimination, rather than the result of a race or gender-neutral factor (e.g., no job vacancy, job applicant not qualified for the position)." *Id.*, at 6307.

As explained in the Section regarding the availability of race-conscious measures below, an insistence that data eliminate other causes of disparities between minorities employed in the industry and those qualified for that employment is not necessary to establish a basis in evidence for the remedial consideration of race. It is also unfortunate that the FCC has called several times for others to provide relevant evidence of discrimination in the industry, while failing to make use of the mass of statistical evidence on that very subject that it required licensees to submit for years. Had the FCC collected and analyzed the very data it required licensees to report, it would not only have been in a position to assess the compliance of its licensees with the employment nondiscrimination regulations, see Section III. A. 1. a. above, but would be in a position to assess the need for remedial consideration of race in licensing on the basis of employment discrimination in the industry. The failure of the FCC to undertake an appropriate analysis of data it already has, in favor of an insistence that others provide it with more detailed information than is necessary, is troubling.

In any event, there can be no serious question that employment discrimination has been a factor in the broadcast and telecommunications industry that has served to deny minorities important preparation for license ownership. The implications of employment discrimination in the industry for appropriate measures are discussed in Section V. A. and C. below.

## **b. Discrimination in Access to Capital**

The Section 257 Studies, as well as other information, provide a basis in evidence of discrimination against minorities in access to credit and capital for those attempting to enter the broadcast and wireless industries. The Capital Markets and Auctions Regression Study or "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes," provides empirical evidence of discrimination in access to capital and the likelihood of minorities winning wireless auctions, and the Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present presents descriptive and anecdotal evidence of discrimination in credit and capital.

### *1. Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes.*

This Study examines two questions: whether minorities experience discrimination in the capital markets in connection with obtaining an FCC broadcast license, and whether minorities are disadvantaged in FCC wireless auctions. In addition to a survey of literature on discrimination in capital markets, each of these questions is examined through logistic regression analyses, controlling for relevant variables. The Study notes that the results of its analyses are not conclusive due to incomplete data and, in some cases, small sample size. As well, the analyses explain statistically significant variations in loan acceptance, interest rates and success in wireless auctions, although not all of those variations, and the directions of the results are consistent. *Id.* at pp. ix, 11, 22, 27.

With respect to discrimination in capital markets, for broadcast licensing, the Study examines survey data respecting the last acquisition from those who successfully obtained licenses between 1970 and 1999 through comparative hearings, as data from unsuccessful applicants was unavailable and broadcast license auctions were not examined, and assesses whether, controlling for relevant variables, race had an effect on the denial or approval of applications for debt financing and interest rates at which financing was made available. *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes*, pp. iv-vi & n. 1, 9, 12-14. For wireless auctions, survey data respecting the latest attempt to acquire a license from both successful and unsuccessful applicants, together with data from the FCC, was used to assesses whether, controlling for relevant variables, race had an effect on the relative rate of success in obtaining a wireless license. *Id.* at pp. iv, vi-vii, 10.

The Study contains a literature survey of empirical studies using data over two decades, not specific to the broadcast industry, finding or suggesting that racial discrimination exists in U. S. capital markets in both denial rates and interest rates, when controlling for creditworthiness, equity, and other characteristics, and compared to business failure rates. *Id.* at pp. 4-7.

With respect to the capital markets and FCC licenses, the Study first reports data from survey participants demonstrating that "that there is significant dependence on capital

markets by broadcast firms and by auction participants.” *Id.* at pp. 11-12. Second, the Study reports the results of several regression models of the experience of broadcast licensees, controlling for relevant variables, demonstrating that minorities’ applications for debt financing were less likely to be accepted, at statistically significant levels, in each of the models. *Id.* at pp. vi-vii, 14-16.<sup>8</sup> Among applicants for wireless licenses, the Study reports the results of regression models, again controlling for relevant variables, demonstrating that the applications of minorities (and women) for debt financing were less likely to be accepted, at statistically significant levels, in each of the models. *Id.* at pp. vii, 19-20. Third, the Study reports the results of two regression models of the experience of broadcast licensees, controlling for relevant variables including collateral and personal guarantees, demonstrating that minority applicants for debt financing pay higher interest rates than non-minorities at statistically significant levels in each model. *Id.* at pp. vi-vii, 16-17.<sup>9</sup> As well, the Study reports the results of three regression models of the experience of wireless auction applicants, also controlling for these variables, demonstrating that minority-owned firms were charged higher interest rates than non-minority firms. *Id.* at pp. vii-viii, 20-21.

The Study also examined the question whether there were differences in the ability of minority participants to obtain licenses in wireless auctions. This was done in order to test the hypothesis that, if minorities experienced discrimination in capital markets, they may be less successful in purchasing FCC licenses at auctions or in the secondary market. *Id.*, at p. v. The Study observed under-representation in the utilization rate of minorities in wireless auctions, as did the FCC Econometric Analysis of Potential Discrimination Utilization Ratios for Minority- and Women-Owned Companies in FCC Wireless Spectrum Auctions, discussed above. Although not investigating all of the potentially relevant variables that might produce this under-representation, the hypothesis of capital market discrimination would be one factor affecting this under-utilization. *Id.*, at p. 22.

With respect to the probability of winning wireless auctions, the Study analyzed survey data and data from the FCC for applicants and qualified bidders and was modeled on auction behavior. *Id.*, at p. 10, 22-25. The data did not include the amount of financing available to each applicant, but the Study controlled for auction characteristics and firm traits such that differences in the probability of winning auctions were interpreted as a function of capital constraints operating on the participants. *Id.*, at p. 24.

The Study reports the results of seven models of the probability of winning an auction, controlling for a number of variables. In each of the seven models, minority applicants

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<sup>8</sup> The experience of minority licensees differed not only from non-minorities, but from women, as in these models applications from women were less likely to be accepted than men, but not at statistically significant levels. *Id.* at pp. vii, 15.

<sup>9</sup> The negative impact of race was evident in interest rates when comparing the amount of equity and the debt to-assets ratio of minority and non-minority applicants, but not cash flow, where lenders tend to reduce interest rates for minorities more than non-minorities in response to cash flow. *Id.* at p. 17. The same positive effect of expected positive cash flow of minority applicants’ was observed among wireless auction applicants. *Id.*, at p. 21.

had a lower probability, at levels of statistical significance, of winning a license in the most recent auction in which they attempted to obtain a license. *Id.*, at pp. viii, 22, 26.<sup>10</sup>

The results reported in this Study are consistent with anecdotal evidence presented in the *Historical Study* regarding discrimination in lending and access to capital and the effect of that discrimination in preventing minorities from successfully obtaining licenses. Indeed, the *Historical Study* provides anecdotal evidence that identifies more particularly the ways in which discrimination occurs and its effects on opportunities.

2. *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* ("*Historical Study*")

The *Historical Study* presents a substantial amount of anecdotal evidence relating to access to capital as a barrier to entry into the broadcasting and wireless industry. Indeed, the Study devotes thirty-three pages to the subject, a greater share than any other topic. The Study reports anecdotal evidence on the importance of access to capital to participation in the industry, the impact of discrimination in access to capital on the ability of minorities to pursue ownership opportunities, the administrative costs of discrimination in access to capital, the increased cost of capital to minorities through higher interest rates, the exclusion of minorities from networks that provide access to capital, the inability of other programs to meet the needs of minorities to obtain capital and the effect of deregulation and market consolidation on minorities' access to capital. See *Historical Study* at pp. 17-50.

**c. Other Discrimination in the Industry Marketplace**

Two of the Section 257 Studies include evidence suggesting the existence of racial discrimination in other aspects of the broadcast and wireless industries. More particularly, the Advertising Study, *When Being No. 1 Is Not Enough: the Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations*, and the *Historical Study*, *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present*, both present evidence of discrimination that affects the ability of minorities to succeed in obtaining ownership of broadcast and wireless licenses. Each is briefly discussed.

**i. Advertising**

The Advertising Study was undertaken to examine whether racially discriminatory advertising practices existed in the broadcast industry. Advertising revenue is critical to the success of a broadcasting enterprise. As discussed in the earlier studies, the projected revenue and profitability of a station is an essential factor in securing financing for and obtaining a license. Also, revenue is crucial to the profitability of an enterprise and

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<sup>10</sup> This compares to the experiences of women applicants, where there was a lower probability of success, but at statistically significant levels in only five of the seven models. *Id.*, at p. 26.

therefore its capacity to expand through the acquisition of other licenses. Thus, to the extent that discrimination affects broadcast revenue for minority owners or potential revenue for prospective minority broadcasters, it is a market entry barrier to minority ownership.

The Study was commissioned to “examine whether minority or women-owned firms, and small firms, which have acquired FCC broadcast licenses, have greater difficulties in obtaining advertising or are affected by industry practices which may lower their advertising revenue.” *When Being No. 1 Is Not Enough: the Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations*, p. 7 (footnote omitted). The Study investigated, in particular, practices in which advertisers or their agencies direct that commercials not be aired on stations serving minority populations, referred to as “no Urban/Spanish dictates,” and in the rates at which they purchase advertising time from minority owned or formatted stations, referred to as “minority discounts.” *Id.*, at p. 8. The Study was to be preliminary, identifying areas for further research. Submitted in 1999, no further research has been presented since.

The Study uses qualitative and quantitative information. In-depth interviews with radio industry executives and surveys from minority-owned radio stations and were used to collect qualitative information, however the Study indicates that the “survey response rates and survey design did not produce results that can be generalized to the universe of minority broadcasters.” *Id.*, at p. 10. The quantitative analyses utilized national data from available commercial sources, as to which two analyses were undertaken. The first measured advertising performance according to “power ratios,” or a radio station’s ability to convert share of listeners into share of market revenue, and “station revenue,” considering the program format, race of ownership and number of stations owned nationally. The second quantitative analysis compared average household income and racial percentages of listeners for minority-formatted and general market programmed stations. The Study reports that funding was insufficient for analysis “that simultaneously controls for all variables that may affect advertising performance” and, thus, suggests further research that can control for other variables, such as audience income. The results of the Study are to be considered preliminary and to inform future research. *Id.*, at pp. 10-11.

The Study found that minority-formatted radio stations earned less revenue per listener than those with general market formatting, and that minority-owned radio stations earned less revenue per listener than majority-owned stations with a comparable number of stations nationwide. *Id.*, at p. 11.<sup>11</sup> Disparities were also found between minority- and majority-owned stations that targeted minority audiences, and between small majority-owned broadcasters and minority-owned broadcasters in both minority-formatted and general market formatted stations. *Id.*, at pp. 14-15. Measured by station revenue, general market formatted had greater revenue than minority-formatted stations, and majority-owned had greater revenues than minority-owned stations in either format. However, the Study also found some results raising questions as to the reasons for

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<sup>11</sup> The Study reached no conclusions with regard to television advertising, due to the fact that survey results produced no consensus and given differences in television programming. *Id.*, at pp. 16-17.

disparities in revenue. Comparison of minority-owned broadcasters to small majority-owned broadcasters (not controlling for station rank and market) showed minority-owned stations with greater revenue. *Id.*, at p. 15. The Study also found that racial minorities comprise a larger share of the audience of minority formatted stations and that the household incomes of minority formatted stations are lower than that of general formatted stations. *Id.*, at pp. 61-63. Analysis of "cost per point" suggests that advertisers pay a lower cost to reach the smaller included Black audience through general format programming in a metropolitan area, while analysis of "cost per thousand" indicates that advertisers pay a higher rate to reach one thousand Black listeners compared to all metropolitan listeners. *Id.*, at pp. 76-78. Finally, station revenue and the ability to translate market share into revenue are enhanced by increased ownership both nationally and in a local market. *Id.*, at pp. 78-81. Thus, the Study suggests a number of factors that might contribute to these disparities in advertising performance that were not evaluated, and further research into these questions was suggested. *Id.*, at pp. 11-12, 16.

The Study did identify from the anecdotal evidence descriptions of eight advertiser or agency practices or perceptions based upon race, and often contraindicated by marketing data, that would contribute to these disparities, including direct evidence that both "dictates" and "minority discounts" were commonly employed by advertisers or their agencies. *Id.*, at p. 12-13. It should be noted that, in addition to the anecdotal evidence gathered in interviews and from surveys, industry practice involving racially explicit advice to purchase less advertising on minority-formatted stations than stations with white audiences was documented in materials prepared and used by a major, national radio advertising group to train its employees and by a broadcasting company in a presentation to national advertisers. *Id.*, at pp. 43-47. Evidence of this specificity and scale, from these sources, and corroborated by consistent indicators of discriminatory practices and outcomes such as these in the anecdotal evidence, together with statistical indicators of disparities in advertising performance provides significant evidence of discrimination in advertising against minority-formatted and minority owned broadcasting. Anecdotal evidence to the same effect is provided in the Historical Study. See Historical Study, at pp. 58-67.

## **ii. Access to Information and Contacts Leading to Ownership Opportunities**

Among the anecdotal evidence of discrimination in the broadcasting industry presented in the Historical Study, is evidence of discrimination and discriminatory practices that affect the opportunity of minorities to become aware of, compete for and acquire broadcast licenses. This evidence included instances of refusing to communicate with and providing false information regarding the availability and price of stations on the market. This was revealed through informal "testing" techniques in which a minority and a non-minority make inquiries regarding the same property and receive different information – the minority receiving less favorable information on availability and pricing. See *Whose Spectrum Is It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present*, at p. 54-55. As well, the anecdotal evidence relates the explicitly discriminatory refusal even to sell broadcasting

time to a would-be minority owner to begin community-specific programming as a means toward ownership. *Id.*, at p. 54.

In addition to more explicit and direct discrimination, the Study also provides anecdotal evidence that minorities are excluded from networks of white owners and brokers, variously referred to as “keep[ing] it in the family” and “the inner circle,” within which acquisition opportunities are known and transactions are negotiated prior to minorities even becoming aware of the potential for acquisition. This phenomenon was described by both white and minority interviewees, and the availability of information and ease of acquisition for white broadcasters contrasted sharply with that of minorities. *Id.*, at pp. 56-58.

This evidence also suggests the importance of tax credits for minority access to ownership, as it is reported that minorities became aware of opportunities for acquisition when that incentive was available to prospective sellers, but minorities lost access to that information when the tax credit incentive was removed. *Id.*, at p. 56. The effects of repeal or abandonment of measures to increase participation of minorities is important evidence of discrimination in the opportunities of minorities to participate in the market. While this anecdotal evidence does not substitute for quantitative data regarding the effects of the abandonment of the tax credit program, it suggests that the program was an important means of overcoming discriminatory access to information and opportunities that can lead to minority license acquisition.

The record of FCC policies and their results and empirical and anecdotal evidence all suggest that discrimination has been an important factor limiting the opportunities of minorities to participate as owners in the broadcast and wireless industry. As discussed more fully below, this evidence presents an adequate basis in evidence that remedial efforts are needed to remedy the effects of this discrimination on minority license ownership.

## **B. Preventing Discrimination**

In 1996, Congress included in the FCC’s mission an explicit obligation to “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service,” 47 U.S.C. Section 151. Even prior to this statutory obligation, the Supreme Court recognized that the FCC properly has an interest in proscribing and preventing discrimination in broadcasting, at least with respect to employment. *Metro Broadcasting*, 539 U.S. at 554-55 quoting *NAACP v. FPC*, 425 U.S. 662, 670, n. 7 (1976). These obligations to prevent discrimination in the use of the spectrum as a public asset are consistent with the purpose and effect of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, prohibiting discrimination in programs that receive federal assistance. Thus, the FCC’s interest in preventing discrimination is established in legislation, recognized by the Court and in harmony with national policy.



The Section 257 Studies clearly provide evidence indicating the likelihood, if not the existence, of discrimination in the operation of the FCC and in the broadcast and wireless industry. This evidence suggests the need for measures to prevent discrimination both by the FCC and actors in and related to the industry, and provides a strong basis in evidence for consideration of race in furtherance of that interest, to the extent strict scrutiny is applicable. Moreover, particularly with respect to advertising, the Section 257 Studies indicate the unique need for efforts on the part of the FCC, as there is no specific statutory scheme or governmental enforcement agency to address this form of discrimination that affects the lifeblood of broadcasting. That is, while Title VII of the Civil Rights Act of 1964 prohibits and provides enforcement mechanisms against employment discrimination and the Equal Credit Opportunity Act prohibits and provides enforcement against lending discrimination, no specialized statute or enforcement mechanism is available to address discrimination in advertising, although it is unlawful to discriminate in contracts. See 42 U.S.C. §§ 1981, 1981a.

The FCC's interest in preventing discrimination and means of doing so are discussed more fully in Section IV., below.

### **C. FCC Interest in Diversity**

As noted above, in *Metro Broadcasting*, the Supreme Court held that consideration of race as a means of achieving "broadcast diversity" satisfied a standard of intermediate scrutiny, that is, served an "important governmental objective" and was "substantially related to achievement of that objective." In *Adarand*, the Court subsequently held that strict, not intermediate, scrutiny applied to federal race-conscious action, that is, that the governmental interest must be "compelling" and the means employed "narrowly tailored" to achieve the interest. Last year, in *Grutter*, the Court held that diversity in student admissions constituted a compelling interest for the consideration of race in college admissions. These developments raise the question whether "broadcast diversity" represents a compelling interest that would satisfy the first requisite of strict scrutiny.

In order to inform an analysis of the status of diversity as a compelling interest, it is important to examine briefly the concept of broadcast diversity. In addition, review of the Section 257 Studies for evidence relevant to the issue of broadcast diversity is appropriate.

The concept of broadcast diversity is one that has developed from the mission and experience of the FCC and its licensing processes and practices. The concept of broadcast diversity can be traced to the factors considered by the FCC in the comparative hearing process beginning in the 1940s. As noted in the History of the Broadcast Licensing Process Section 257 Study, among the factors the FCC has favored are: the local residency of the owners from which, it was expected, would flow an understanding of local needs; integration of ownership and management, by which owners would effect operations and programming; owners' active participation in civic affairs; and broad diversification of background and interests. See History of the Broadcast Licensing Process, at pp. 4-5. These considerations were incorporated into the licensing factors

identified in the 1965 Policy Statement on Comparative Broadcast Hearings. *Id.*, at pp. 5-6.

Subsequent to the decision in *TV 9, Inc. v. FCC*, discussed in connection with the history of FCC policies above, FCC began considering minority ownership and participation in station management as one of several factors related to diversification and integration of management in the comparative hearing proceedings. Later, in its *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F. C. C. 2d 979 (1978), provided that minority ownership and participation in management would be considered as a "plus" to be weighed with all other relevant factors in comparative hearings. The rationale for these considerations was premised upon recognition that "the views of racial minorities continue to be inadequately represented in the broadcast media .... [a] situation is detrimental not only to the minority audience but to all of the viewing and listening public," and that "[a]dequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience .... [and] enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Id.*, at 980-981 (footnotes omitted). Thus, consideration of the race of an owner was related to the underrepresentation of the views of racial minorities, the impact on both minority and non-minority audiences and the enhancement of diversified programming generally. But consideration of the race of owners also was premised on "diversity of control of a limited resource," in the context of the FCC's judgment that diversity of control "is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Id.*, at 981. It is on this basis that both the FCC and Congress have viewed broadcast diversity and the role of minority ownership in achieving that goal over the years and in a variety of policies. See *Metro Broadcasting*, 497 U.S. at 566-79.

Broadcast diversity has also been the subject of academic research and study. This research has identified a number of dimensions of broadcast diversity, including diversity of media sources, diversity of programming, diversity of viewpoints and diversity of audiences served, of which a focus on racial minorities is but one aspect. See *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*, at p. 2-4 & n. 3, 28 (citing research); *The Conceptualization and Measurement of Diversity*, 30 Communication Research 60, 62 (2003); see also *Deconstructing the Diversity Principle*, 49 J. Comm. 7 (1999). Indeed, various methods have been developed and tested to measure diversity in broadcasting. *The Conceptualization and Measurement of Diversity*, 30 Communication Research, at pp. 74-77. Thus, in addition to the policies and experience of the FCC, the concept of broadcast diversity is established in scholarly literature and there is a body of research elucidating broadcast diversity, its features and measurement.

The Section 257 Studies make a contribution to this research literature. There are two such studies that address the issue of broadcast diversity: *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?* ("Content/Ownership Study"); and *Whose Spectrum Is*

It Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present ("Historical Study"). Each is briefly discussed.

1. *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*

The Content/Ownership Study was designed to determine "whether race or ethnicity of a broadcast station's owner has a meaningful influence on the contribution by that station to broadcast spectrum programming diversity." *Diversity of Programming in the Broadcast Spectrum: Is There a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?*, at p. 37. The Study examined the concept of diversity "as any programming efforts related to race or ethnicity," including "to include ethnic or racial perspectives in programming, to shape broadcast content with ethnic or minority audiences in mind, to engage in community activities geared toward women or minorities, or to include racial or ethnic minorities in on-air positions." *Id.*, at p. 28. The Study involved a bivariate analysis comparing minority- and majority-owned stations, and multivariate regression analyses involving a number of variables to determine whether the differences between minority- and majority-owned stations were explained instead by one or more of these variables. *Id.*, at p. 26-29. The Study used results of a survey instrument directed to news or public affairs programming directors and data from the Broadcast Industry Association. *Id.*, at p. 5.

Results of the Study's bivariate analysis demonstrate that minority-owned stations provide "a wider variety of news and public affairs programming and more ethnic and racial diversity in on-air talent" than majority-owned stations, although some of these differences are statistically significant only for radio broadcasting. "Minority-owned radio stations do more public affairs programming ... [and] spend more time thinking about particular audience subgroups' interests and needs," notably racial and ethnic minorities. *Id.*, at p. 26-27. The multivariate analyses demonstrated that two factors—staff diversity and minority ownership—remained significant predictors of diversity in radio programming after controlling for other variables, and that staff diversity but not minority ownership continued to predict diversity in television programming. *Id.*, at pp. 33-36. Accordingly, the results of the Study provide empirical support for the connections between the race or ethnicity of an owner and diversity in broadcasting particularly radio. *Id.*, at p. 38.

2. *Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present*

As discussed above, the Historical Study was designed to examine the history of discrimination in the broadcast and wireless industries, and not to elicit information regarding broadcast diversity. Nevertheless, the Study's interviews of minority and non-minority participants alike identified the importance and significance of diversity of ownership not only in serving the unmet interests and needs of minority communities, but in promoting community responsiveness and free speech and contributing to innovation

in programming. Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present, at pp. 78-83. These observations expressed an understanding of a well-developed mission of broadcasters and the FCC in connection with established policies and interests of promoting diversity of programming. *Id.*, at pp. 81, 82-83. Interviewees also expressed concern regarding the loss of programming diversity and the values and purposes it has served in connection with the lifting of ownership caps in the Telecommunication Act of 1996 that have stimulated, if not encouraged, consolidation in the broadcasting industry, with the effect of reducing the number of small and minority license holders. *Id.*, at pp. 78-79, 81-82.

The responses of interviewees led the Study's authors to several conclusions on the issue of diversity of programming, free speech and civic values. Specifically, the Study found a lack of "critical mass" of minority broadcasters due to the effects of decades of discriminatory exclusion from broadcasting, FCC minority ownership measures that produced only "modest gains through the mid-1990s [that] had hardly the opportunity to take root" before termination of the programs and market consolidation reduced minority participation. *Id.*, at p. 126. The Study also concluded that the relaxation of ownership caps was identified as the cause of recent "substantial difficulties in competing and surviving" and of reductions in the participation of small- and minority-owned radio and television broadcasters. *Id.*, at p. 129. One of the effects of these developments "has been a dramatic loss in the diversity of viewpoints provided by the nation's mass media," as "[i]nterviewees uniformly reported that small, minority-owned businesses are more integrated, aligned with, and responsive to the local communities that they serve .... [and] [t]heir declining participation in broadcast and wireless ownership, it appears, has resulted in a diminished concern for local issues and needs, which has led to a loss of diversity of viewpoints." *Id.*, at pp. 129-30.

This background and evidence relating to the interest of broadcast diversity is discussed in connection with an analysis of the current state of broadcast diversity as a compelling interest in Section V. C. 2., below.

### **C. Other Potential Compelling Interests**

The Supreme Court's openness to the prospect of identifying other compelling interests, see *Grutter and Wygant v. Jackson Board of Education*, 476 U.S., at 286 (opinion concurring in part and concurring in judgment), counsels that other interests related to the broadcast and wireless industries should be examined. Several interests are suggested by statutes and judicial decisions, notably promoting competition, and promoting universal service.

#### **1. Promoting Competition**

Promoting and ensuring competition in the use of the limited spectrum administered by the government has long been of fundamental concern to the FCC and Congress and might be considered a potential compelling interest. As noted above, "diversification of control of the media of mass communications" has been a concern of the FCC in

licensing, and the Telecommunications Act of 1996 has as one of its purposes "to promote competition." Promoting competition has been an important aspect of the exercise of authority under the Commerce Clause of the Constitution and is an interest that supports the exercise of legislative and regulatory authority in the marketplace, for example in antitrust legislation. The FCC continually has noted that it administers a finite public resource and operates under a congressional mandate to exercise its authority in a manner that promotes the "public interest." The nature of this government regulation of a scarce resource heightens the interest in ensuring full and fair competition.

While promoting competition has not been examined as a compelling interest, its consideration as such an interest in the context of FCC licensing may be useful. Numerous programs that provide preferences or advantages for small businesses are recognized as constitutional. Of course, these are race-neutral measures designed to promote the small business entry and participation in the economy. In the specific context of the public resources administered and regulated by the FCC, where the manner in which the communications industry was established and subsequent race-neutral means of promoting competition have not created circumstances in which members of particular segments of the population are participating, measures taking account of the characteristics of those not participating might be appropriate. Promoting participation from all quarters of our society serves also to promote competition. As Commissioner Martin has noted: "By choosing candidates from a larger, more diverse pool, broadcasters and MVPDs will be better able to find the most qualified candidates. A more talented workforce leads to improved programming, which ultimately benefits all consumers. The program we adopt today therefore should promote not just diversity, but also true competition." *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd 24018, 24078 (2002).

In order to consider race as a factor, "relevant differences" related to race on matters central and fundamental to competition should be established, as simple "racial balancing" or proportional representation would violate the Fourteenth Amendment. The Supreme Court found such relevant differences in the context of student diversity and the marketplace of ideas in a university setting in *Grutter*, and this Report suggests that such differences exist with respect to program diversity. Relevant differences in relation to competition might be found in other innovations and approaches to communications. That inquiry is beyond the scope of this Report. Of course, to the extent that the lack of competition on the basis of race or ethnicity stems from discrimination, measures to address that condition properly would be supported by the compelling interest in remedying discrimination.

## **2. Promoting Universal Service**

A third potential compelling interest may be that of promoting "universal service." Federal communications legislation has long identified as a goal of federal policy achieving accessible communications services to all of the people regardless of region, income and other factors including race and ethnicity. The Communications Act of 1934,

although not expressly referring to universal service, referred to a purpose of “regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .” 47 U.S.C. Section 151 (1994). Likewise, the Telecommunications Act of 1996, amended the Communications Act of 1934 to include Section 254, “Universal Service.” The Act provides that “[u]niversal service is an evolving level of telecommunications services that the [FCC] shall establish periodically . . . taking into account advances in telecommunications and information technologies and services” and including among others such services that “are essential to education, public health, or public safety” and that “are consistent with the public interest, convenience, and necessity.” The Act provides that the FCC can designate these services to be supported by Federal universal service assets.

The concept of universal service as a compelling interest is one that has not been unexplored.<sup>12</sup> Nevertheless, the ever-growing importance of access to information on the internet and through other telecommunications services in “the diffusion of knowledge and opportunity” and “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation” suggests that universal service serves many of the interests found to support the concept of student diversity as a compelling interest. See *Grutter*, 539 U.S. at 331-32. Further examination and articulation of this interest and its basis and significance should be explored. See *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of “Universal Service,”* 26 Hastings Comm. & Ent. L.J. 1 (2003).

Review of the record of FCC practices and evidence in the Section 257 Studies and from like sources suggests that there is a compelling interest for consideration of race in remedying discrimination in the broadcast industry as a consequence of FCC policies, and in both broadcasting and wireless due to its participation in these industries where discrimination exists. As well, there is likely a basis for a compelling interest for considering race together with other factors to achieve broadcast diversity under the reasoning of *Grutter* and *Metro Broadcasting*. Finally, there is a compelling interest and congressional authority for consideration of race in order to prevent discrimination and may be a compelling interest for appropriate consideration of race in promoting competition and universal service in the unique circumstances of regulating limited access to the electromagnetic spectrum.

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<sup>12</sup> Although not proposing that universal service should be recognized as a compelling interest supporting consideration of race in governmental decision-making, it has been suggested as the basis for governmental efforts to provide resources and services to those otherwise unable to secure access to advanced telecommunications technologies. See *Racial Minorities and the Quest to Narrow the Digital Divide: Redefining the Concept of “Universal Service,”* 26 Hastings Comm. & Ent. L.J. 1 (2003).

#### IV. CONSIDERATIONS OF NARROW TAILORING

Strict scrutiny requires not only that consideration of race be justified by a compelling interest, but narrowly tailored to accomplish the compelling purpose. The Supreme Court has looked to four aspects of race-conscious measures to determine whether they satisfy narrow tailoring. "In determining whether race-conscious remedies are appropriate, we look to several factors, including [1] the necessity for the relief and the efficacy of alternative remedies; [2] the flexibility and duration of the relief, including the availability of waiver provisions; [3] the relationship of the numerical goals to the relevant labor market; and [4] the impact of the relief on the rights of third parties." *U.S. v. Paradise*, 480 U.S. 149, 171 (1987) (citations omitted). Each of these factors is discussed in turn.

The factor of necessity of relief and efficacy of alternatives looks to whether race-conscious means are needed and, in that regard, whether consideration was given to race-neutral alternatives that as effectively would serve the compelling purpose. "Narrow tailoring ... require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve" the compelling interest. *Grutter*, 539 U.S. at 339; *Croson*, 488 U.S. at 507, *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6 (1986). "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Grutter*, 539 U.S. at 339. Nor does it require the entity to employ race-neutral means that would cause it to abandon its particular mission. In short, race neutral means must serve the interest "about as well." *Id.*, quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6 (1986).

The factor of flexibility and duration of the measure, including waiver provisions, inquires whether consideration of race is flexible, not rigid or solely determinative, and is afforded in a context of individualized consideration of applicants regarding all relevant factors, rather than insulating some applicants from competition with others.<sup>13</sup> "To be narrowly tailored, a race-conscious admissions program cannot use a quota system--it cannot "insulate each category of applicants with certain desired qualifications from competition with all other applicants." *Grutter*, 539 U.S. at 334 quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). "Properly understood, a "quota" is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the individual from comparison with all other candidates for the available seats. In contrast, a permissible goal . . . requires only a good-faith effort . . . to come within a range demarcated by the goal itself, and permits consideration of race as a "plus" factor in any given case while still ensuring that each candidate competes with all other qualified applicants." *Id.*, at 335 (internal quotations and citations omitted); compare *Gratz v. Bollinger*, 539 U.S. 244, 271-72 (lack of individualized consideration and mechanical award of points made race determinative).

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<sup>13</sup> The Supreme Court has recognized that, in some circumstances, numerical requirements can be imposed on the distribution of benefits, subject to the narrow tailoring considerations described here. See *Steelworkers v. Weber*, 443 U.S. 193 (1979) and *U.S. v. Paradise*.

In the contest of the diversity interest, a proper “program must be ‘flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.’” *Id.*, at 334 quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).<sup>14</sup>

“The requirement that all race-conscious admissions programs have a termination point ‘assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself.’” *Grutter*, 539 U.S. at 342 quoting *Croson*, 488 U.S. at 510 (plurality opinion). Thus, consideration of race must be temporary and in service of the goal to be attained, with periodic attention given to the appropriateness of the goals and progress in their accomplishment, not permanent measures. *Id.*; *Johnson*, 480 U.S. at 639-40; *id.*, at 654-55 (O’Connor, J., concurring in the judgment).

Inquiry into the relationship between numerical goals and appropriate measures of the interest to be served by the compelling that interest is to ensure that “[t]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” *Id.*, at 333 quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). Thus, any numerical goals employed cannot be overinclusive and must be tailored to achievement of the legitimate goal and not simple “racial balancing.” *Croson*, 488 U.S. at 506-07. Goals premised on the remedial interest are appropriate where they focus on eliminating underrepresentation in positions taking into account appropriate measures of availability for those positions. *Johnson*, 480 U.S. at 635, 639-40; *id.*, at 654 (O’Connor, J., concurring in the judgment); see *Croson*, 488 U.S. at 501-02, 507. With respect to plans designed to achieve diversity, the inquiry is focused on the “relationship between numbers and achieving the benefits to be derived from ... divers[ity] ...,” and a “goal of attaining a critical mass of underrepresented minorit[ies]” and “[s]ome attention to numbers,” without more, does not transform a flexible admissions system into a rigid quota.” *Grutter*, 539 U.S. at 335-36 quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.).

Finally, narrow tailoring requires an assessment of the impact of the relief on the rights of third parties “to assure that [the measures] will work the least harm possible to other innocent persons competing for the benefit,” and that those not favored by the measures are not “unduly burden[ed].” *Id.*, at 341 (internal quotations and citations omitted). In cases where “set-asides” are appropriate, this interest is served where “[t]he plan does not require the discharge of white workers and their replacement” and where no “absolute bar to the advancement” of others is created, and the measures are otherwise narrowly tailored. See *Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979); see *U.S. v. Paradise*, 480 U.S. at 208-09. In other contexts, this concern is satisfied where, in service of appropriate goals, “race or ethnic background may be deemed a ‘plus,’” but “[n]o persons

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<sup>14</sup> The determinative nature of race and concerns of over- or under-inclusiveness may also be ameliorated in remedial programs by provisions that serve to focus measures on those likely to have suffered from discrimination or be in need of remedial assistance, although the availability of remedial measures is not limited to actual victims of discrimination. *Adarand Constructors Inc. v. Slater*, 228 F.3d 1147, 1183-88 (10<sup>th</sup> Cir. 2000); see *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 474 (1986).



are automatically excluded from consideration and] *all* are able to have their qualifications weighed against those of other applicants.” *Johnson*, 480 U.S. at 637-38; *id.*, at 655-56 (O’Connor, J, concurring in the judgment). With individualized consideration of all candidates, harm appropriately is minimized in the context of diversity, when “all pertinent elements of diversity” are considered. *Grutter*, 539 U.S. at 341 quoting *Bakke*, 438 U.S. at 317 (opinion of Powell, J.).

## **V. AVAILABLE COURSES OF ACTION AND FURTHER STEPS**

The record of the FCC and evidence provided in the Section 257 Studies and in other sources, together with narrow tailoring considerations, suggest a number of measures that the FCC can implement to address minority ownership. As well, gaps in data in certain areas and information useful in understanding and defining certain concepts and their application suggest several courses of action by which the FCC could further inform and expand the bases for consideration of race, provide a basis for additional measures or important features of presently available measures, or inform the narrow tailoring considerations in designing measures.

The types of measures available to the FCC and Congress are identified below. These correspond to the bases for such measures established in the record. A discussion of the details or particular features of programs, policies and initiatives is beyond the scope of this Report and is not presented. The types of measure available are discussed below with respect to broadcasting and wireless.

### **A. General Measures**

The record regarding FCC licensing suggests that a number of measures are necessary and appropriate to address discrimination against and disadvantage to minorities. These measures are not race-conscious in the sense of providing benefits or imposing burdens on the basis of race and consider race only to the extent appropriate for investigation and enforcement. These measures include:

1. Prohibiting discrimination in transactions related to licensing and establishing investigation and enforcement mechanisms

Legal prohibitions on discrimination in commercial transactions generally are limited to one statute making unlawful intentional discrimination in the making or enforcement of contracts. 42 U.S.C. Section 1981. There is no federal agency charged with enforcement of this prohibition and no administrative investigation or enforcement mechanism. This is contrasted, for example, with anti-discrimination measures in employment and housing and lending, for which there are specific statutes and federal and state investigative and enforcement agencies. See Title VII of the Civil Rights Act of 1964, as amended, and Title VIII of the Civil Rights Act of 1968. Similarly, there are statutes and means of governmental enforcement that focus on the areas of credit, education, public accommodations, voting and all activities of recipients of federal financial assistance.